No. 09-640

IN THE

Supreme Court of the United States

VICTOR MOLINA DE LA VILLA,

Petitioner,

—v.—

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR THE PETITIONER

This case cleanly presents an issue on which *eleven* circuits have reached four different conclusions, and which will affect, at a minimum, hundreds of cases for years to come. The government attempts to characterize the split as "narrow," but the dispute has already cast doubt on the meaning of this Court's retroactivity jurisprudence, and will necessarily cause further conflict in other areas of immigration law. The government cites statistics showing that the issue will affect "only" hundreds of cases in the coming years, but the statistics are misleading and, as the government's own data shows, probably inaccurate. Finally, the government does not dispute that this case presents a comprehensive vehicle for resolving all aspects of this circuit split.

I. The Conflict Between the Circuits Is Widespread and Significant.

The government cannot seriously dispute that the split in the circuits on the question presented is almost as severe as it could possibly be. Eleven of the twelve circuits have now decided the question presented, and in doing so have adopted four different views, with two circuits suffering from significant internal division. At least five of those circuits have rejected the government's position (as embodied in its regulations), as has a sixth in its most recent ruling. *See* Pet. for Cert. at 13-17 (Second, Third, Fifth, Eighth, and Tenth Circuits allow at least some non-citizens convicted by trial to

establish retroactive effect, as does the last published decision from the Ninth Circuit).[1]

The government mistakenly argues that the disagreement among the circuits is "narrow," BIO at 10, characterizing the split as a dispute over whether reliance is just "one consideration" in determining retroactive effect or instead is a prerequisite to such a showing. BIO at 13. However, this characterization ignores the massive doctrinal and practical difference between a rule that reliance is a *prerequisite* to show retroactive effect and a rule that reliance is one significant factor to consider in determining retroactive effect. In those circuits where reliance is a prerequisite to finding retroactive effect, the continuing validity of cases such as *Landgraf*, *Rivers*, and *Hughes* will remain in doubt, because in each of those cases this Court found retroactive effect without *any* showing of reliance. *See* Pet. for Cert. at 15; *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 282-86 (1994) (holding that provision allowing punitive damages in sex discrimination cases created retroactive effect, even though sex discrimination was unlawful prior to the law's enactment); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313-14 (1994) (holding that an increase in monetary liability for race discrimination created retroactive effect even

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[1] Another circuit has recently joined the two circuits that have adopted the government's view. *Kellerman v. Holder*, 592 F.3d 700, 705-06 (6th Cir. 2010) (apparently adopting the view of the First and Seventh Circuits that only non-citizens who plead guilty can show retroactive effect). *Kellerman*'s discussion of the nature of the circuit split is yet more evidence of widespread confusion on this issue in the courts of appeal. *See id.*

though race discrimination was understood to be prohibited at the time the conduct occurred); *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 947 (1997) (holding that law eliminating defense against suits alleging fraud in government contracts created retroactive effect, even though such fraud had been unlawful since 1863). Indeed, the Ninth Circuit suggested that *Landgraf* itself had been undermined by the Court's later retroactivity cases in the precedent decision relied upon by the panel in this case. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1133 (9th Cir. 2007) ("Petitioner overlooks, moreover, that the central focus of [*Martin v. Hadix*, 527 U.S. 343 (1999) and *INS v. St. Cyr*, 533 U.S. 289 (2001)], both of which post-date *Landgraf* and *Hughes Aircraft*, was the party's reliance interest."). Such confusion concerning the governing retroactivity caselaw will continue absent this Court's intervention.

The split at issue also has tremendous practical significance. Thousands of immigrants will be denied relief in those circuits where the government's regulation implementing *St. Cyr* was upheld. Nor will the resulting conflict be limited to 212(c) cases; the divide over this issue will also create parallel splits in other areas of immigration law involving retroactivity analysis, because various other forms of immigration relief also turn on criminal history. This too has already begun, as the government does not dispute. *See* Pet. for Cert. at 26-27.[2]

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[2] The government asserts that this case cannot serve to resolve circuit splits on these parallel issues, including one which

The government also states that the Court reconfirmed the "importance of reliance" in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). BIO at 9. But the question that has split the circuits is not whether reliance is important, but whether it is dispositive. Two courts of appeals have rejected the view that reliance is a prerequisite since *Fernandez-Vargas* was decided, which should put to rest the suggestion that it provided clarity with respect to the proper role of reliance. *Cf.* Pet. for Cert. at 12 n.8 (arguing that a different passage of *Fernandez-Vargas* makes clear that reliance is *not* required).

The government notes that this Court has denied other petitions for certiorari presenting these issues. However, the Court denied most of those petitions before the split became acute, and all of them arose before the Eighth Circuit joined the Third, thereby creating two circuits where reliance is in no way a prerequisite to showing retroactive effect. *See* U.S. Pet. at 11-13, *United States v. O'Brien & Burgess*, No. 08-1569, *cert. granted*, 130 S. Ct. 49 (2009) (arguing that a different split was unlikely to resolve itself once a second circuit adopted the minority viewpoint).

Petitioner raised below in this case, because these issues are not fairly presented in the question. BIO at 11 n.3. But the Court would necessarily resolve the parallel disputes in these other contexts if it decided this case, because the issue in those cases is analytically identical to the one presented here, as the courts of appeals have recognized. *See, e.g., Camins v. Gonzales*, 500 F.3d 872, 880-82 (9th Cir. 2007) (citing *St. Cyr* and circuit caselaw interpreting 212(c) to resolve parallel retroactivity issue concerning effect of convictions predating enactment of 8 U.S.C. § 1101(a)(13) (2010)).

Most important, the government does not argue here, as it did in earlier petitions, that the question is not cleanly presented. Petitioner argued below that reliance was not required to establish retroactive effect, that he could show that he relied on the availability of Section 212(c) under both an objective and a subjective test, and that he was entitled to the opportunity to make an individualized showing if in fact such a showing is required. *See* Pet. for Cert. at 8-10, 32-33. This Court can resolve the disagreements over the question presented comprehensively in this case, and thereby bring much-needed uniformity to this area of the law.[3]

II. The Issue Will Affect Numerous Cases for Years to Come.

The government also errs in arguing, as it has repeatedly over the last several years, that the split at issue here is insignificant because the underlying statute is too old to affect a large number of cases. However, the government's data on this question appears too unreliable to support its claim, and in any event does not account for recent improvements in databases and more vigorous enforcement initiatives that will bring many new lawful permanent residents with very old convictions into the system for years to come. *See* Pet. for Cert. at 22-25.

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[3] The government also argued in response to earlier petitions that the Court should delay review in light of a then-recent BIA regulation, but it no longer advances that argument, likely because the regulation has not been accorded deference by any circuit to consider the question. *See* BIO at 14, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008).

The government relies on statistics from the most recent data concerning Section 212(c) relief to argue that the number of existing applications is decreasing rapidly. BIO at 17. Those statistics are misleading for several reasons.

First, the statistics relied upon by the government are of questionable reliability. The government's own information concerning the number of Section 212(c) grants in any given year has varied dramatically, and (to the extent there is any trend), have shown a substantial increase in the number of recorded 212(c) grants. For example, in 2007 government data recorded only 392 grants for fiscal year ("FY") 2004, but in its data for 2008 the same number (that is, 212(c) grants in FY 2004) jumped to 1,905. [4] Similar anomalies in the government's data exist for other fiscal years as well. If the government relied on the earlier numbers to determine that the number of potential cases would be small, it should have re-visited that conclusion in light of the massive increase recorded by its own data.

In any event, the small sample size of five years here hardly reveals a trend in the number of applications. The government asserts a drop of 55 percent over five years, BIO at 17, but the individual years reveal no trend. According to the 2009 data (which of course may be revised substantially in 2010

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[4] *Compare* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Year Book R3 (2008), http://www.justice.gov/eoir/statspub/fy07syb.pdf, *with* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf.

or later), the number of applications actually *increased* from FY 2005 to 2006, and dropped less than three percent from FY 2006 to 2007. At best, this data reveals only that while there may be some fluctuations in the number of applications in the future, there will be hundreds of them either way.

The data at issue also likely understates the number of forthcoming 212(c) applications because it fails to account for new initiatives that will bring more long-time lawful permanent residents into the system. *See* Pet. for Cert. at 24. In particular, two of the initiatives that will likely cause an increase in Section 212(c) applications are very recent.

The "Secure Communities" initiative, which will ultimately result in immigration checks for everyone brought to a county jail, was only initiated in selected cities in 2009, and will not be fully implemented until 2013.[5] Similarly, the program to perform criminal background checks on people renewing their lawful permanent residence cards appears to have begun only in 2006.[6] If that initiative is generating a large number of new cases, many of those cases have probably not yet been filed in the federal courts. Moreover, the renewal

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[5] *See* U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/deployment/ (last visited Feb. 23, 2010).

[6] *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. and Nat'l Benefits Ctr. Dr. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf.

obligation itself only applies to those who obtained green cards after 1989. As a result, approximately three million people who, like Mr. Molina, obtained their green cards prior to that date will encounter the system only in the future, when they travel abroad, are subjected to a worksite raid, or are stopped by police for some other reason.[7]

III. The Ninth Circuit's Decision Is Wrong.

The government spends much of its brief defending the Ninth Circuit's decision on several different rationales, some of which are inconsistent with the government's own regulations. For present purposes, the critical point is that its arguments have been rejected in their entirety by two circuits, and in large part by three more (with at least some panels in at least three others also likely disagreeing with the government's view). Beyond that, only a few points bear mention.

First, the government appears to assume that Mr. Molina faced no immigration consequences at all from his conviction at the time it occurred, and therefore could not have relied on 212(c) relief. *See* BIO at 13. This is erroneous; the conviction rendered him excludable, and he therefore needed Section 212(c) relief to ensure his re-admission in the event that he took a "meaningfully interruptive" trip abroad. *See* Pet. for Cert. at 6. Of course, that consequence is minor compared to the massive

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[7] *See* Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* Table 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf.

consequence he faces now if he cannot apply for relief – permanent mandatory deportation – but this only proves that the retroactive effect is severe in this case.

Second, the government claims that the view of the Third Circuit, which is now also the view of the Eighth Circuit, must be incorrect because *St. Cyr*'s discussion of the *quid pro quo* aspect of the guilty plea process would have been superfluous had this view been correct. However, *St. Cyr* focused not only on the *quid pro quo* exchange, but also on altering the consequences of "deciding whether to accept a plea offer or instead to proceed to trial," *St. Cyr*, 533 U.S. at 323. The logic of that statement as well as others in *St. Cyr* unquestionably applies to people who ultimately decided to go to trial. *See id.* at 322 ("as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). In any event, *St. Cyr* did not purport to foreclose other possible sources of retroactive effect, which is unsurprising given that the Court had no need to look beyond the guilty plea, given the "obvious and severe" retroactive effect with respect to that past transaction. *St. Cyr*, 533 U.S. at 325.

Third, while the government suggests that retroactive effect could not possibly be tied to the underlying criminal conduct itself, BIO at 15, that claim is hardly as outrageous as the government suggests. This Court has already found retroactive effect with respect to laws increasing the penalty associated with previously-unlawful sexual harassment, race discrimination, and fraud in government contracting. *See Landgraf*, 511 U.S. at 282; *Rivers*, 511 U.S. at 302-03; *Hughes*, 520 U.S. at

947. Indeed, given that the retroactive effect doctrine owes its origin to *Ex Post Facto* principles, one would think the analogy to criminal conduct an obvious starting point for retroactivity analysis. *See Landgraf*, 511 U.S. at 266-268; *see also Thom v. Ashcroft*, 369 F.3d 158, 163 n.6 (2d Cir. 2004) (Calabresi, J.).

The government also suggests that knowing the true immigration consequences would have served no purpose, as Mr. Molina had no alternative that would have allowed him to escape deportation because his plea negotiations were unsuccessful. BIO at 14. This is incorrect for two reasons. First, it ignores the effect of that knowledge on the plea negotiations themselves. As *amici* National Association of Criminal Defense Lawyers argued below, both Mr. Molina and his defense attorney would have been far more inclined to pursue a plea agreement had they known of these dramatic immigration consequences. Second, had Mr. Molina simply pled guilty to the charge, he would have been able to apply for 212(c) relief under current law, regardless of the sentence he received. Had he known this at the time, he might well have pleaded guilty to avoid mandatory deportation.

Finally, it is telling that the government itself repeatedly conflates the different kinds of reliance and proof requirements in its brief, thus defending positions that are inconsistent with its own regulations and further revealing the depth of the confusion at hand. For example, the government suggests that Mr. Molina should have to show an "affirmative act" of reliance in order to establish retroactive effect, BIO at 16, but the government's

regulations categorically bar people from obtaining relief if convicted by trial, regardless of what affirmative acts they may be able to show. 8 C.F.R. § 1212.3(f)(4) (2010). The government also suggests that *St. Cyr*'s rule should be limited to people convicted after November 1990, when the rule barring 212(c) relief for people serving more than five years went into effect. BIO at 12. This too is inconsistent with the government's own regulations, which authorize people convicted by plea prior to 1990 to obtain 212(c) relief. *See* 8 C.F.R. § 1212.3(f)(4)(ii) (2010).[8] Similarly, the government claims that Mr. Molina cannot make the necessary showing of reliance because he did not engage in any kind of *quid pro quo* exchange analogous to that which occurs when a defendant pleads guilty. BIO at 14 (arguing that Petitioner cannot show reliance because he "did not forgo anything" or "[give] up anything"). But reliance and *quid pro quo* exchange are two different concepts, both of which are properly understood as relevant but not dispositive in retroactivity analysis. It should be obvious that a criminal defendant who decides to exercise his right to trial relies on the maximum possible punishment when making that decision, even though he gives up nothing by going to trial.

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[8] It is also wrong, both because Mr. Molina did suffer immigration consequences as a result of his conviction at the time it occurred, *see supra* at 8-9, and because *St. Cyr*'s reasoning concerning retroactivity cannot be so narrowly limited to the facts in that case, which may be why *none* of the eleven circuits have interpreted *St. Cyr* in accord with this argument.

CONCLUSION

For these reasons and those stated in the petition, Petitioner respectfully requests that the Court grant the writ of *certiorari* in this case.

Respectfully submitted,

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